

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of: James M. BRUGGER., et al.)	Confirmation No: 3932
)	
Application No.: 10/797,666)	Group Art Unit: 3761
)	
Filed: March 8, 2004)	Examiner: Melanie Jo Hand
For: BLOOD-CONTACTLESS MEASUREMENT OF ARTERIAL PRESSURE		

United States Patent and Trademark Office
Customer Service Window, Mail Stop AF
Randolph Building
401 Dulany Street
Alexandria, Virginia 22314

PRE-APPEAL BRIEF REQUEST FOR REVIEW

Sir:

Applicants request review of the Final Office Action mailed 4/19/2007 and the advisory action mailed 9/12/2007. This request is filed concurrently with a Notice of Appeal, and no amendments are being filed with this request. The review is requested for the reasons provided below. A Notice of Appeal and a petition for extension of time accompanies this request.

Claims 6-9 are pending, claims 1-5 having been canceled. Claims 6-9 stand rejected under 35 U.S.C. §102(b) as anticipated by Truitt et al (US Patent No. 5762805). Claim 6 is the sole independent claim.

I. The Final Rejection Fails To Provide a *Prima Facie* Case for Anticipation under 35 U.S.C. §102(b)

Claims 6-10 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Truitt et al (U.S. Patent 5,762,805). The rejections omit an essential element required for a *prima facie* case of anticipation by failing to show that the reference contains, either expressly or inherently, a controller that maintains a pressure in an arterial line by controlling the rate of flow of a pump that pumps fluid through the arterial line.

A claim may be rejected for anticipation only if a single reference contains every element of the claim, either expressly or inherently. Claim 6 recites, *inter alia*,

a pump configured to convey blood through said arterial blood line ... a sensor configured to sense pressure in said non-blood side of said filter, and a controller ... to maintain a constant pressure in said arterial blood line by regulating a speed of said pump in response to said pressure signal

Claim 9 recites, *inter alia*,

a blood pump that conveys blood through the arterial blood line, a controller with a sensor to detect pressure on the filter non-blood side and to vary a rate of flow of the pump such that a constant predefined pressure is maintained in the arterial blood line.

In support of the rejection of the claim, the Examiner states,

Truitt ... teaches ... that a signal from pressure sensor 83 is received by monitor computer 104 which then sends its own communication based on the data from sensor 83 to control computer 102, which then supplies control signals based on this received signal from the monitor computer 104 to control operation of pumps 52, 62, 66, 78 and 84. The Office interprets the teaching “control the operation of the pumps” to mean controlling or regulating the speeds of the pumps, as the operation or output of the pump is always a sole result of the pump’s speed. ... Truitt meets all of the claim limitations of claim 9, specifically a controller and a sensor that together regulate the speed of the pump. It is interpreted that by teaching such a system, the problem sought to be solved by Truitt is providing a system that maintains a desired, constant predefined pressure, according to a particular patient’s treatment plan.

(emphasis added). Thus, according to the Examiner’s stated basis for the rejection, Truitt’s disclosure of a pressure signal applied to a first controller communicating with a second controller, the latter controlling the operation of a pump, expressly or inherently discloses the quoted elements of the rejected claims. However, in Truitt, the pressure signal 83 is indicated to

be used for monitoring the filter and the circuits, but is nowhere shown to be used to control the pump as required by the rejected claims. In addition, Truitt does not contain the limitations concerning a controller that maintains a constant pressure by controlling the pump, as required by the rejected claims.

The regulation of the pump in response to the signal supplied by sensor 83 is not contained in the reference, but the Examiner has stated that the limitations necessarily flow from the teachings of Truitt. “In relying upon the theory of inherency, the examiner must provide a basis in fact and/or technical reasoning to reasonably support the determination that the allegedly inherent characteristic necessarily flows from the teachings of the applied prior art.” MPEP §2112.IV. Applicants submit the Examiner has not met this requirement. The Examiner states that the control computer 102 controls the pumps and that it receives signals from a monitor computer 104, which receives signals from the sensor 83, but provides no basis for the inference that that a pump conveying blood through an arterial line is controlled in response to the pressure signal or to regulate the pump to maintain the pressure. Thus, the Examiner has not provided a basis in fact and/or technical reasoning to support the determination that the limitation necessarily flows from the teachings of Truitt.

Applicants note that the Advisory Action also states that “the phrase ‘to maintain a constant pressure in said arterial blood line’ is functional language that is given little patentable weight herein.” Applicants submit that “configured to maintain a constant pressure in said arterial blood line by regulating a speed of said pump in response to said pressure signal” is a proper use of functional language which limits the controller’s structure.

CONCLUSION

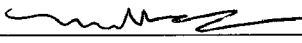
For at least the foregoing reasons, the Office has failed to establish a *prima facie* case of anticipation under §102 because the reference fails to contain every element of the rejected claims, either expressly or inherently. It is thus respectfully requested that the rejections be withdrawn.

Should the Examiner feel that there are any issues outstanding after consideration of this response, the Examiner is invited to contact the undersigned to expedite prosecution of the application.

The Commissioner is hereby authorized by this paper to charge any fees during the entire pendency of this application including fees due under 37 C.F.R. §§ 1.16 and 1.17 which may be required, including any required extension of time fees, or credit any overpayment to Deposit Account 50-3840. **This paragraph is intended to be a CONSTRUCTIVE PETITION FOR EXTENSION OF TIME in accordance with 37 C.F.R. § 1.136(a)(3).**

Respectfully submitted,

Date: October 5, 2007
Patent Administrator
Proskauer Rose LLP
1001 Pennsylvania Avenue, NW
Suite 400
Washington, DC 20004
Telephone: 202.416.6800
Facsimile: 202.416.6899
CUSTOMER NO: 61263



Mark A Catan
Attorney for Applicants
Reg. No.: 38,720

Customer No. 61263